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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF CALIFORNIA, *et al.*,
Appellants,

v.

CABAZON BAND OF MISSION INDIANS, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

BRIEF AMICI CURIAE OF PUEBLO OF LAGUNA, AGUA CALIENTE BAND OF MISSION INDIANS, CHEMEHUEVI INDIAN TRIBE, GILA RIVER INDIAN COMMUNITY, INTER-TRIBAL COUNCIL OF NEVADA, INC., MICCOSUKEE TRIBE OF INDIANS OF FLORIDA, NATIONAL CONGRESS OF AMERICAN INDIANS, POARCH BAND OF CREEK INDIANS, PUYALLUP TRIBE OF INDIANS, RED LAKE BAND OF CHIPPEWA INDIANS, SAC & FOX TRIBE OF INDIANS, SENECA NATION OF INDIANS, AND SHOSHONE AND NORTHERN ARAPAHOE TRIBES OF THE WIND RIVER RESERVATION

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INTEREST OF AMICI CURIAE

The tribal *amici* are all federally-recognized Indian tribes which exercise powers of self-government. All tribal *amici* consider their ability to generate revenues, including bingo revenues where desired, as a key element in their efforts to control their destiny and decrease their dependence on the federal government.

For the Pueblo of Laguna of New Mexico, a main priority is improving the welfare of its members. The Pueblo of Laguna has developed numerous business enterprises that provide income to the Pueblo and employment for its members. The Pueblo currently does not engage in any bingo activities, but views this case as potentially reducing its options for increasing tribal independence and raising tribal members' standard of living without a corresponding need for increased federal funding. The Pueblo also views this case as one which potentially may infringe drastically upon the ability of the Pueblo to exercise its sovereign powers without state interference and subject tribal members to hostile state control.

The Agua Caliente Band of Mission Indians and the Chemehuevi Indian Tribe are located on separate reservations in California. While they do not now conduct bingo games on their reservations, they view the instant case as clarifying the scope of P. L. 280 and, more generally, the circumstances under which the state may have control over activities of their members, control which will affect dramatically the Tribes' options for development in the future.

The Gila River Indian Community believes that a reversal or modification of the decision below would have a substantial impact upon it and its members, the Pima Indian Tribe and the Maricopa Indian Tribe. The Tribes of the Gila River have since time immemorial maintained a system of government and, in more recent times, the Pima and Maricopa have organized as the Gila River Indian Community. In the summer of 1984, the Tribes entered into a lease development and management agreement to operate Jai Alai and, further, decided to allow parimutuel wagering on the reservation which has led to litigation with the State of Arizona raising issues similar to this case which have yet to be resolved. A reaffirmation of the Tribes' right to govern their own activities by this Court will enable the Tribes to improve

and expand various governmental programs involving tribal members' health and social welfare.

The Inter-Tribal Council of Nevada, Inc. ("ITCN") is incorporated under the laws of the State of Nevada. ITCN is an exclusive tribal membership organization composed of 25 federally-recognized Tribes. The general corporate mission of ITCN is to promote the health, education, business, cultural and governmental needs of its members. ITCN is a strong advocate of tribal government and places emphasis upon the Tribes' authority, management and jurisdictional integrity to govern their people.

The Miccosukee Tribe of Florida has an enrolled membership of over 500 Indians. While the Miccosukee currently do not operate any gambling activities on their Reservation, they view the operation of bingo games as an attractive means to generate substantial revenues for the Tribe. The Miccosukee Tribe is seeking to generate additional funds to bolster all aspects of tribal programs, ranging from education to economic development.

The National Congress of American Indians ("NCAI") was founded in 1944 and is the oldest and largest national organization of Indian governments and individuals in the United States, with a membership of federally-recognized tribes representing a combined population of over 750,000 American Indian and Alaska Native people. NCAI and its members have a profound concern for the ability of Indian tribes to protect their sovereign immunity and self-governance rights. Such rights are critical to the survival of Indian tribes as distinct cultural entities, and to the economic development desperately needed to break the cycle of poverty which has plagued Indian people for generations.

The Northern Arapahoe Tribe of the Wind River Reservation is vitally affected by this litigation since it has conducted a bingo operation since 1984. That operation

is managed and controlled through the Northern Arapahoe Entertainment Committee, a tribal governmental body elected by the Tribe. Revenues from the bingo operation are used primarily for tribal employment.

The Poarch Band of Creek Indians conduct, pursuant to a Tribal ordinance and a contract approved by the Secretary of the Interior, a commercial bingo operation on the Tribe's reservation in Atmore, Alabama. The outcome of this case will directly affect the Tribe's sovereign authority to conduct its commercial business in order to raise governmental revenues free of state regulatory control.

The Puyallup Tribe of Indians is located in the western part of the State of Washington. The only natural resource which generates revenue for the Tribe or its members is the meager salmon fishery harvested under the Tribe's treaty rights. The Tribe licenses, regulates and taxes bingo games operated by members of the Tribe pursuant to a tribal ordinance approved by the Secretary. Tax revenue from these enterprises furnishes virtually all of what little non-federal revenue the Tribe generates in its effort to become more self-sufficient. The revenues from the bingo activities are used for tribal governmental purposes such as law enforcement, fisheries management, housing and the tribal school system.

The Red Lake Band of Chippewa Indians is located on the Red Lake Reservation in Minnesota, with almost two-thirds of its 7,500 total enrolled members living on the Reservation. The inherent rights of sovereignty possessed by the Red Lake Band have been recognized by the State of Minnesota[1] and the principle that the "State of Minnesota has no authority to govern the affairs of persons *within* the territorial boundaries of the Red Lake Reservation except as specifically authorized

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[1] The Red Lake Band has been excepted by Congress from the State's P.L. 280 jurisdiction.

to do so by Congress" has been accepted by the State of Minnesota. *Red Lake Band of Chippewa Indians* v. *State of Minnesota, et al.*, 311 Minn. 241, 248 N.W. 2d 722, 726 (1976). The Red Lake Band by tribal law for years has regulated the conduct of bingo games and presently operates a tribal bingo game managed by tribal members. The revenues generated by the tribal bingo games are used to stimulate economic development and supplement the tribal governmental budget.

The Sac & Fox Tribe of Indians of Oklahoma provides various governmental services to its members and all other persons within its jurisdiction, ranging from police and fire protection through a variety of social programs. The Tribe, although not an owner of a bingo operation, regulates and licenses bingo activity within its jurisdiction, and tribal revenues from bingo operations within its jurisdiction comprise a significant portion of the tribal tax base. The Sac & Fox Tribe has filed as an *amici* in this case in order to protect its tax base from interference by the State.

The Seneca Nation of Indians of New York is governed by a Tribal Council that has operated pursuant to a constitution for the last 140 years. The Seneca's bingo operation generates a significant portion of the total non-federal operating revenue of the Tribe. The revenues which the Seneca Nation generates are used to meet the needs of its 5,750 members in areas such as law enforcement, education, economic development and tribal government.

The Shoshone Tribe of the Wind River Indian Reservation in Wyoming has over 2,400 tribal members who reside on the Reservation. The Tribe currently does not engage in any bingo activities, but views this case as one which potentially may infringe drastically upon the ability of the Tribe to exercise its sovereign powers without state interference and subject tribal members to hostile state control.

Amici essentially are tribes whose ancestors bargained for and received Congressional acknowledgement of their right to reside on their reservation free from regulation by the states. Accordingly, the tribes have a considerable interest in halting the increasing tendency of courts, in effect, to lower the barriers to state jurisdiction over Indians on their reservations through the use of a "balancing of governmental interests" test.

SUMMARY OF ARGUMENT

In this case, California seeks to regulate Indian Tribes' conduct of bingo games on their reservations. These Tribes, however, enjoy an historic immunity from state laws on their reservations which was confirmed by Congress in the Act setting aside the reservations. Congress has not divested these Tribes of any relevant aspect of their immunity from State laws, such as authorizing the state to regulate the tribal bingo games. No federal law, including Public Law 83-280 and the Organized Crime Control Act, grants the State the jurisdiction it seeks here or makes the Tribes' conduct of bingo games a federal offense. Accordingly, this case is controlled by the rule in *McClanahan* v. *Arizona Tax Commission*, 411 U.S. 164 (1973), that state laws are not applicable to Indians on a reservation absent express federal consent.

Appellants, nonetheless, seek to avoid *McClanahan* by urging that the relevant federal laws and the backdrop of Indian immunity from state laws in this case be ignored through the application of a balancing test to determine whether the State may regulate the Tribes. Appellants argue, pursuant to the balancing test, that state interests outweigh federal and tribal interests. The application of a balancing test, however, to determine whether a state has regulatory jurisdiction over *Indians* on a reservation never has been employed by this Court. Instead, the balancing test has been applied only where state regulatory jurisdiction over *non-Indians* on a reservation,

with respect to whom states may have legitimate interests, was at issue. Thus, to apply a balancing test in this case would require the Court to ignore over 150 years of its federal Indian decisions.

Appellants also allege that in the absence of state jurisdiction, organized crime, among other horribles, will pervade the tribal games. No such evidence exists in this case. Moreover, even if such evidence existed, federal and tribal laws are adequate to address any problem which may arise at the games. And, in any event, Appellants' remedy properly is legislative rather than judicial in light of this Court's long deference to Congress where adjustments to Indian immunities are sought.

ARGUMENT

I. CALIFORNIA'S ATTEMPT TO REGULATE INDIAN TRIBES' CONDUCT OF BINGO GAMES ON THEIR RESERVATIONS IS PRE-EMPTED UNDER FEDERAL LAW.

A. Where Indian Tribes Enjoy a Tradition of Immunity from State Regulation That Is Confirmed by Congress, This Court Long Has Held That Immunity May Not Be Repealed Absent the Clear Consent of Congress.

1. *The Applicable Law.*

Stripped to its essence, this case concerns the attempt by a state, without Congressional consent, to impose its laws upon Indian tribal governments on their reservations. The state laws at issue—regulating the conduct of bingo games—are imposed directly upon Indian tribes that operate bingo games on their reservations, rather than upon the Indian and non-Indian participants in those games. *See, e.g., Cabazon Band* v. *County of Riverside*, 783 F.2d 900, 901 (9th Cir. 1986). This case, therefore, falls squarely within the long-standing rule of federal Indian law that: "State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall

apply." *McClanahan* v. *Arizona Tax Commission*, 411 U.S. 164, 170-171 (1973), *quoting from* U.S. Department of the Interior, Federal Indian Law 845 (1958).

Appellants, nonetheless, seek to avoid *McClanahan* and numerous other decisions by urging (1) the State has regulatory jurisdiction over the Indian Tribes' bingo games because, upon the application of a balancing test, State interests outweigh federal and tribal interests,[2] and (2) the Tribes, in any event, have been divested of their immunity from state control sufficiently to permit the State to regulate the Tribes' bingo games. Neither assertion has any merit because a balancing test never has been employed by this Court where state regulatory jurisdiction on a reservation over Indians, in contrast to non-Indians, is at issue and, in this case, the Tribes' historic immunity from state control was confirmed by Congress in the Act setting aside the reservations, 26 Stat. 712 (1891), which immunity never subsequently was repealed.

Specifically, Appellants' proposed balancing of governmental interests, to determine whether state jurisdiction lies over activities on an Indian reservation, has been applied by this Court *only* where a state seeks to impose its law upon *non-Indians*. In those circumstances, states arguably have legitimate interests at stake and, moreover, no federal treaty or laws, in the first instance, immunize non-Indians in Indian territory from state control. The same simply cannot be said where Indians in Indian territory are proposed to be regulated by a state, in light of tribes' long immunity from state control and the existence of federal laws, such as treaties and Acts setting aside the reservations, confirming that immunity. Indeed, it was for these reasons precisely that this Court

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[2] In particular, Appellants urge that the undermining of state gambling laws resulting from tribes' conduct of bingo games on their reservations free of state laws, non-Indian participation in the tribal games and the mere fear of organized crime infiltration in those games are State interests this Court must weigh against federal and tribal interests to uphold State jurisdiction in this case.

in *McClanahan* ruled that the relevant federal treaties and laws, read against a backdrop of Indian immunity from state control, rather than a balancing of governmental interests, govern the determination of whether Congress has manifested the requisite clear consent to state regulatory jurisdiction over Indians on a reservation. 411 U.S. at 173, 179. In *McClanahan*, this Court specifically rejected the balancing test in the context of state regulatory jurisdiction over Indians, observing:

> we reject the suggestion that the Williams test [under which a balancing of governmental interests is required] was meant to apply in this situation. It must be remembered that cases applying the Williams test have dealt principally with situations involving non-Indians. . . . In these situations, both the Tribe and the State could fairly claim an interest in asserting their respective jurisdictions. 411 U.S. at 179.

Accordingly, Appellants' proposed balancing of governmental interests to determine whether state jurisdiction lies in this case plainly is inapplicable as it conflicts directly with *McClanahan*.

The proposed balancing test also conflicts with over 150 years of federal law and policy. Specifically, beginning with *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832), where this Court held the State of Georgia had no authority to impose its laws within Indian territory in light of Indian tribes' original sovereignty and the treaty at issue there, states repeatedly have been denied any jurisdiction in Indian territory except: (1) where Congress plainly has divested Indian tribes or their members of some relevant aspect of their original immunity from state laws or has manifested clear consent to state jurisdiction over Indian tribes or their members in Indian territory; or (2) in certain extraordinary circumstances which justify a state's imposition of its laws directly upon non-Indians in Indian territory.

This Court's reluctance to uphold state jurisdiction over Indians on their reservations is rooted firmly in

longstanding federal law and policy recognizing Indian tribes as sovereigns insulated by an historic immunity from state and local control. *See McClanahan*, 411 U.S. at 168, *citing Rice* v. *Olson*, 324 U.S. 786, 789 (1945). In *United States* v. *Kagama*, 118 U.S. 375, 383-385 (1886), this Court considered the source of tribes' immunity from state laws, observing:

> [t]*hey* [*the Indian tribes*] *owe no allegiance to the States*, and receive from them no protection. Because of the local ill feelings, *the people of the States where they are found are often their deadliest enemies. United States* v. *Kagama*, 118 U.S. 375, 383-384 (1886). (Emphasis added.)

In view of tribes' historic immunity from state control, this Court has been reluctant to find a repeal by implication of that established tradition of immunity and self-governance. *See, e.g., Bryan* v. *Itasca County*, 426 U.S. 373, 392 (1976). Moreover, because Indian tribes' immunity from state control typically was confirmed clearly by Congress, this Court consistently has been loath to disturb such immunity without clear manifestations of Congressional intent to repeal the immunity. *See, e.g., McClanahan*, 411 U.S. 164 (1973). *See also*, Cohen, *Handbook of Federal Indian Law* 116-117 (1942 ed.).

In determining whether a repeal of tribes' immunity from state control has been enacted, the Court employs special rules of construction, noting: "[t]he canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." *Montana* v. *Blackfeet Tribe of Indians*, 105 S. Ct. 2399, 2403, *citing Oneida County* v. *Oneida Indian Nation*, 105 S. Ct. 1245, 1258 (1985). One of those rules which is applicable here, is that statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit, *see, e.g., McClanahan*, 411 U.S. at 174.

Applying the above-described rules and presumptions, in *McClanahan*, for example, this Court unanimously held

that Indian income and property on an Indian reservation are not subject to state taxation, and in so holding did not employ a balancing test. The Court first noted state laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that state laws shall apply. *Id.* at 170-171. The Court then acknowledged a tradition of tribal immunity from state taxation of Indian income and property in Indian territory before turning to the relevant treaty and statutes. *Id.* at 173. In the relevant treaty, the Court observed the provision setting apart a prescribed reservation "for the use and occupation of the Navajo tribe of Indians," applied the rule that ambiguous provisions are to be interpreted in favor of tribes, and concluded,

> [w]hen this canon of construction is taken together with the tradition of Indian independence described above, it cannot be doubted that the reservation of certain lands for the exclusive use and occupancy of the Navajos . . . was meant to establish the lands as within the exclusive sovereignty of the Navajos under general supervision. *Id.* at 174-175.

The Court further reasoned:

> It must always be remembered that the various Indian tribes were once independent and sovereign nations, and that their claim to sovereignty long predates that of our own Government . . . They were, and always have been, regarded as having a semi-independent position when they preserved their tribal relations; not as States . . . *thus far not brought under the laws of the Union or of the State within whose limits they resided.* *Id.* at 172-173. (Emphasis added.)

Similarly, in *Montana* v. *Blackfeet Tribe of Indians*, 105 S. Ct. 2399 (1985), this Court was presented with the question whether states may tax Indian royalty income produced from on-reservation tribally-owned min-

erals. The Court first observed that, in light of the backdrop of Indian sovereignty, states may tax Indians in Indian territory only when Congress has manifested clearly its consent to such taxation. The Court then held States have no authority to tax Indian mineral royalty interests because the relevant mineral leasing acts do not contain the requisite explicit consent to such taxation. 105 S. Ct. at 2404. The Court reasoned:

> [i]f *the tribal organization . . . is* preserved intact, and recognized by the political department of the government as existing, then they are a 'people distinct from others' . . . *separated from the jurisdiction of [the State], and to be governed exclusively by the government of the Union. Id.* at 2403, *quoting from The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867). (Emphasis added.)

Accord, Moe v. *Salish and Kootenai Tribes*, 425 U.S. 463 (1976); *Kennerly* v. *District Court of Montana*, 400 U.S. 423 (1971); *Bryan v. Itasca County*, 426 U.S. 373, 375-378; *see also*, U.S. Department of the Interior, Federal Indian Law 845 (1958) (". . . State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that State laws shall apply.").

This Court has sanctioned state jurisdiction over Indians on a reservation only where Congressional enactments plainly have divested the Indians of their immunity from state control. None of these cases, however, supports the State's position here that a balancing test may be employed to uphold state regulatory jurisdiction over Indians on a reservation.

For example, in *Rice* v. *Rehner*, 463 U.S. 713 (1983), this Court held a state could require an Indian on a reservation to obtain a state license to sell liquor on the reservation. In support of its decision, this Court opined,

> Although in Indian matters, Congress usually acts 'upon the assumption that the States have no power to regulate the affairs of Indians on a reservation,'

> Williams v. Lee, 358 US 217, 220, 3 L Ed 2d 251, 79 S Ct 269 (1959), *that assumption would be unwarranted in the narrow context of the regulation of liquor. In addition to the Congressional divestment of tribal self-government in this area, the States have also been permitted, and even required, to impose regulations related to liquor transactions.* 463 U.S. at 723. (Emphasis added.)

The Court thus concluded, ". . . tradition simply has not recognized a sovereign immunity or inherent authority in favor of liquor regulation by Indians," *Id.* at 722, further observing:

> There can be no doubt that Congress has divested the Indians of any inherent power to regulate in this area. *In the area of liquor regulation, we find no 'congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development'* . . . With respect to the regulation of liquor transactions, as opposed to the state income taxation involved in McClanahan, Indians cannot be said to 'possess the usual accoutrements of tribal self-government'. *Id.* at 724. (Emphasis added.)

In short, in *Rehner*, in the unique context of liquor control, this Court found Congress plainly had divested tribes of an aspect of their tradition of immunity from state control and, moreover, had authorized explicitly state jurisdiction over Indians in Indian territory.

In sum, this Court never has employed a balancing of governmental interests test to determine whether a state may assert its jurisdiction over Indian tribes on a reservation. Instead, in every case, that determination is governed by the relevant backdrop of tribal sovereignty and the federal laws confirming that sovereignty. Amici, therefore, urge that this Court not depart radically, as urged by Appellants in this case, from over 150 years of its federal Indian decisions, none of which employed a balancing test in cases where, as here, a state attempts to

regulate directly an Indian tribe on its reservation. *See, e.g., Three Affil. Tribes of Ft. Berthold* v. *Wold Eng'g*, 106 S. Ct. 2305, 2310 (1986).

2. *The Law Cited by Appellants Plainly Is Inapplicable Here.*

In support of their theory that a balancing test be employed here, Appellants borrow liberally *dicta* from *McClanahan* and *Rehner*. Brief for Appellants at 17-18. That *dicta*, however, is a general discussion of principles of state jurisdiction over non-Indians, as well as Indians, in Indian territory and thus should not be taken out of its context to support Appellants' novel theory here concerning state jurisdiction only over Indians.

Appellants also cite in support of their balancing test, *inter alia*, *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324 (1983), and *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980), both of which concern only state jurisdiction over *non-Indians* in Indian territory. Brief for Appellants at 30-32. The record here makes clear, however, that the state laws at issue are to be imposed upon Indian tribes on their reservations. Thus, the federal pre-emption analysis contained in the *McClanahan* line of cases, rather than *Bracker's* balancing of governmental interests, controls in this case.

In *Bracker*, where the state proposed to tax non-Indians who had contracted to haul logs for an Indian tribe on its reservation, the Court noted that the ". . . determination does not depend on mechanical or absolute conceptions of state or tribal sovereignty, but also call[s] for a particularized inquiry into the nature of state, federal, and tribal interests at stake." *Bracker*, 448 U.S. at 145. The Court, moreover, is guided by two independent barriers to state jurisdiction over non-Indians in Indian territory—namely, whether the state jurisdiction infringes upon tribal self-government, *see, e.g., Williams* v. *Lee*, 358 U.S. 217 (1959), or is pre-empted by federal law, *see,*

e.g., *Ramah Navajo School Board, Inc.* v. *Bureau of Revenue of New Mexico*, 458 U.S. 832 (1982). In both cases, the Court balanced the relevant governmental interests to determine whether the state had sufficient interests to justify its jurisdiction over non-Indians on a reservation. *See, e.g.*, *New Mexico* v. *Mescalero Apache Tribe*, 462 U.S. 324 (1983) (under the balancing test, the State has no authority to require licenses from non-Indians hunting and fishing on tribal lands within a reservation). In stark contrast, this Court has not balanced the respective governmental interests in any case involving state jurisdiction over only Indians in Indian territory.[3]

Appellants also cite *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), in support of their position that tribes may not market immunities from state laws to non-Indians, arguing the tribes are marketing their immunities in the bingo games. Brief for Appellants at 13-16. *Colville*, however, does not support Appellants' position for two reasons. First, in Colville, wherein this Court sanctioned state taxation of non-Indians who purchase cigarettes from Indians on a reservation, this Court upheld state regulation of non-Indians. At issue here, in contrast, is a state's attempt to regulate an Indian tribe on its reservation. *Colville*, therefore, simply is inapplicable. Moreover, in any event, *Colville* cannot be construed so broadly as holding tribes may not market their immunities to non-Indians free of state regulation. Instead, *Colville* only holds that where

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[3] It has been suggested that constitutional principles prohibit this Court from balancing governmental interests to determine whether state jurisdiction lies with respect to Indians in Indian territory. A balancing of governmental interests, in the view of commentators, can occur only pursuant to the Indian Commerce Clause and where non-Indian activity is sought to be regulated. *See* Feldman, *Preemption and the Dormant Commerce Clause: Implications in Federal Indian Law*, 64 Ore. L. Rev. 667 (1986); *see also*, Pelcyger, *Justices and Indians: Back to Basics*, 62 Ore. L. Rev. 29 (1983).

non-Indians on a reservation might benefit from tribal immunities, in the application of a balancing test to determine whether state jurisdiction lies with respect to such non-Indians, the tribe's interests are outweighed by the state's where what is being marketed is not reservation-produced, and no significant federal and tribal policies or services are involved. Stated another way, the marketing of tribal immunities alone is not dispositive of whether state jurisdiction lies over non-Indian activities on a reservation. Instead, numerous factors weigh in that calculus. *See Colville*, 447 U.S. at 155-161; *see also, Bracker*, 448 U.S. at 145-152.

In light of the foregoing, Amici will show below that upon application of the federal pre-emption principles described in *McClanahan*, and in light of the fact that the Tribes in this case have not been divested by Congress of any relevant aspect of their immunity from state civil/regulatory control, the conclusion is compelled that the State lacks jurisdiction over the Tribes' conduct of bingo games in this case.

B. The Backdrop of Tribal Sovereignty in This Case Is Imbued With a Tradition of Immunity from State Regulation.

The determination whether a state has jurisdiction over an Indian tribe in Indian territory turns initially on whether historically, ". . . tradition has recognized a sovereign immunity in favor of the Indians in some respect." *Rice* v. *Rehner*, 463 U.S. at 719. That tradition, of historic Indian self-governance and immunity from state control, constitutes the backdrop of tribal sovereignty against which the relevant federal treaties and other enactments are read to determine whether the asserted state jurisdiction is pre-empted under federal law.

In *Rehner*, this Court determined that no Indian immunity exists with respect to the licensing and distribution of alcoholic beverages by Indians in Indian territory because Congress first imposed an absolute prohibition

against such activities and later plainly subjected such activities to state regulation; moreover, no federal policy supporting tribal self-sufficiency and economic development was evidenced in the context of liquor regulation. *Id.* at 723. The Court, therefore, concluded states may regulate the sale of alcoholic beverages by Indians in Indian territory.

In contrast, and quite unlike *Rehner*, here the Tribes have not been divested of any relevant aspect of their tradition of immunity from state law for several reasons. First, Indian bingo games in Indian territory, conducted as part of tribes' governmental function of raising governmental revenues, never have been prohibited under federal law.[4] Moreover, as discussed fully by Amici below, Congress has not authorized state regulation of Indian bingo games. Finally, the record in this case demonstrates firm federal policies supporting Indian tribal bingo games as a means to promote tribal self-sufficiency and economic development. *See Cabazon Band* v. *County of Riverside*, 783 F.2d 900, 904-905 (9th Cir. 1986).

The only federal laws which Appellants assert have divested the Indian tribes of their inherent immunity from state laws with respect to raising governmental revenues—here through the conduct of bingo on their reservations—are the Act of August 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (1953), 18 U.S.C. § 1162, 28 U.S.C. § 1360 (1982), and the Organized Crime Control Act of 1970, 84 Stat. 937 (1970), 18 U.S.C. § 1955. As shown below and discussed more fully by other Amici in this case, however, neither of these laws properly can be construed as divesting the Tribes of their tradition of immunity from the state laws in this case.

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[4] As the Ninth Circuit correctly emphasized, "The focus in determining whether a tribal tradition exists should instead be on whether the tribe is engaged in a traditional governmental function, not whether it historically engaged in a particular activity. The Tribes in this case are engaged in the traditional governmental function of raising revenue. 783 F.2d at 906.

1. *Public Law 83-280.*

Congress has granted California limited jurisdiction over individual Indians in Indian territory pursuant to Pub. L. No. 83-280.[5] Of central concern in this case, therefore, is whether the grant of civil and criminal jurisdiction over individual Indians in Indian territory contained in P.L. 280 includes California's regulation of bingo games conducted by Indian tribes in Indian territory. Amici assert the grant is not so broad as to include the state laws at issue here.[6]

The primary issue before the Congress during the consideration and the enactment of P.L. 280 was the problem of lawlessness on certain Indian reservations. For example, certain reservations were excepted from P.L. 280 because they had "a tribal law and order organization functioning in a reasonably satisfactory manner." H.R. Rep. No. 848, 83rd Cong., 1st Sess. 5-6 (1953). Section 2 of P.L. 280, accordingly, contains a consent to state jurisdiction over criminal offenses committed by Indians in the Indian territory. As discussed below, Amici assert that since the laws at issue here are not criminal in nature, § 2 does not support the State's asserted jurisdiction.

Of more relevance in this case, therefore, is the scope of the grant of civil jurisdiction contained in § 4 of P.L. 280. In light of the exclusive focus in P.L. 280 upon problems of law enforcement and legal disputes between

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[5] Act of August 15, 1953, Pub. L. No. 83-280, 67 Stat. 588-90 (1953), 18 U.S.C. § 1162, 28 U.S.C. § 1360 (1982) (hereinafter P. L. 280).

[6] Because Amici will show herein that P.L. 280, in any event, does not authorize the state jurisdiction at issue here, Amici do not address the compelling argument that state jurisdiction over Indian tribal governments, as compared to tribal members, was not encompassed within the P.L. 280 grant of jurisdiction. *See, e.g., Three Affil. Tribes of Ft. Berthold* v. *Wold Eng'g*, 106 S. Ct. at 2314; *Bryan* v. *Itasca County*, 426 U.S. at 387-388.

reservation Indians, this Court has held that P.L. 280 grants only that civil jurisdiction necessary to resolve private disputes between Indians, and Indians and private citizens. *See Bryan* 426 U.S. at 383. Stated another way, state civil/regulatory laws, such as the laws at issue here, are not encompassed within the P.L. 280 grant of jurisdiction. As this Court in *Bryan* opined.

> we conclude that construing Pub L 280 in pari materia with [the contemporaneous termination] Acts shows that if Congress in enacting Pub L 280 had intended to confer upon the States general civil regulatory powers, including taxation, over reservation Indians it would have expressly said so. [*Bryan*, 426 at 390. *See also*, *Bryan*, 426 U.S. at 384 n. 10.]

Whether California's law governing bingo operations within the State is civil/regulatory, and thus outside the grant of P.L. 280 jurisdiction, has been decided by the Ninth Circuit. *See Barona Group of Capitan Grande Band, Etc.* v. *Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983). *See also*, *Seminole Tribe of Florida* v. *Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982) (finding a similar Florida statute concerning bingo to be civil/regulatory in nature).

In *Barona*, the Ninth Circuit considered whether California's statutory scheme, which exempts bingo from its general prohibition against gambling, is criminal in nature, thus allowing California to exercise jurisdiction over Indians in Indian territory pursuant to § 2 of P.L. 280. Applying the rule that the intent of the State legislature in setting up the particular statutory scheme determines whether a statute is regulatory or prohibitory, the *Barona* court held that California's statutory scheme is civil/regulatory because California does not provide for a general prohibition against bingo. Instead, the State regulates bingo as a money making venture, allows diverse organizations to conduct bingo operations, and per-

mits the general public to participate in those games. *See Barona*, 694 F.2d at 1189, following the rationale of *United States* v. *Marcyes*, 557 F.2d 1361 (9th Cir. 1977), wherein the court noted the mere existence of criminal penalties in the statute was not dispositive, before concluding that a state fireworks law was prohibitory in nature. Amici urge that no law or policy requires this Court to disturb the *Barona* court's conclusions.[7]

2. *Organized Crime Control Act of 1970.*

Appellants assert that Congress, through Section 803(a) of the Organized Crime Control Act of 1970, 18 U.S.C. § 1955 ("OCCA"),[8] has "affirmatively authorized" state regulation of Indian reservation bingo. Brief for Appellants at 31, 41-42. The State further theorizes that § 1955 expresses federal policy permissive of state regulation of Indian reservation gambling as clearly as this Court has held 18 U.S.C. § 1161 expresses federal policy permissive of state control of reservation liquor sales. *See Rehner*, 463 U.S. 713 (1983). Appellants' assertions are without foundation.

The Ninth Circuit concluded in this case, 783 F.2d at 902, that the State laws at issue here are civil rather than criminal in nature. Amici assert here, as will other Amici, and as they did with respect to P. L. 280, that no reasons of law or policy compel this Court to disturb the Ninth Circuit's construction of the State laws at issue. Accordingly, as discussed below, since the OCCA incorporates only the criminal laws of a state, the OCCA cannot be construed either as authorizing the state regulation at issue here or permissive of state regulation on the ground that the activity conflicts with federal law.

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[7] Other Amici in this case will discuss in more detail the reasons why the law at issue is civil/regulatory rather than criminal/prohibitory in nature.

[8] Pub. L. No. 91-452, 84 Stat. 922 (1970) (codified as amended in scattered sections of United States Code).

Section 1955 was enacted to enable federal officials to help states enforce their anti-gambling laws by assimilating such of those laws which are criminal in nature into federal law.[9] Nothing in the statute itself nor its legislative history provides support for Appellants' arguments that the law expanded state jurisdiction to include civil regulation of Indian tribal bingo operations on reservations within the State. The absence of any such support is illustrated by Appellants' failure to refer the Court to any part of the legislative history of the OCCA.[10]

Section 1955 is part of a federal jurisdictional scheme designed to give federal law enforcement officials authority to combat large-scale syndicated gambling operations by making violations of state criminal gambling laws violations of federal law as well. In creating a federal syndicated gambling offense, Congress intended to extend the reach of federal jurisdiction over interstate gambling activities without pre-empting state law. *See, e.g.*, 116 Cong. Rec. H35295. In short, § 1955 merely incorporates state law into *federal* law.

In light of the foregoing, contrary to Appellants' arguments, § 1955 plainly does not expand the reach of state law or state law enforcement jurisdiction to include In-

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[9] 18 U.S.C. § 1955 reads in relevant part: "(b) As used in this section—(1) 'illegal gambling business' means a gambling business which—(i) *is a violation of the law of a State or political subdivision in which it is conducted*;" (Emphasis added.)

[10] Congress's consideration of the legislation eventually enacted as the OCCA spanned two years. *See, e.g., Hearings on S.30 and Related Bills Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970) (hereinafter *Hearings*); H.R. Rep. No. 1549, 91st Cong., 2d Sess. *reprinted in* 1970 U.S. Code Cong. & Admin. News 4007; S. Rep. No. 617, 91st Cong., 1st Sess. (1969); 116 Cong. Rec. S36280 (Oct. 12, 1970); 116 Cong. Rec. H35287 (Oct. 7, 1970); 116 Cong. Rec. H35191 (Oct. 6, 1970); 116 Cong. Rec. S952 (Jan. 23, 1970); 116 Cong. Rec. S820 (Jan. 22, 1970); 116 Cong. Rec. S575 (Jan. 21, 1970); 115 Cong. Rec. S769 (Jan. 15, 1969); 115 Cong. Rec. S39906 (Dec. 18, 1969).

dian reservations or any other geographic area over which a state does not already have jurisdiction. Stated differently, § 1955 neither adds to nor subtracts from a state's existing jurisdiction over gambling activities otherwise subject to state law. Similarly, despite Appellants' assertions to the contrary, App. Br. at 42 n.26, the OCCA grants no authority to state officials to enforce the federal law. Indeed, the granting of any such enforcement authority would be pointless because state officials already have authority to enforce their own laws where those laws apply. As explained by the Department of Justice during hearings on the legislation:

> The [OCCA] will not interfere with a State's right to regulate the conduct of citizens *within its jurisdiction.* It is an anti-racketeering measure only and . . . *will be enforced by the Department of Justice* strictly in accord with its legislative purpose. (Emphasis added.)

Hearings at 170.

With respect to the assertion that the OCCA outlaws the Tribes' bingo games and, thus, in the tradition of *Rehner*, federal policy should be construed as permissive of State regulation, the legislative history makes clear the OCCA did not, and was not intended to, provide states with a basis upon which to extend their regulatory jurisdiction. As stated in the House hearings, "[The OCCA] would not affect the State enforcement [of anti-gambling laws] at all." *Hearings* at 194 (statement of Asst. Atty. Gen. Will Wilson, U.S. Dept. of Justice). More specifically, in enacting OCCA title VIII, the "Syndicated Gambling" title which contains § 1955, Congress was concerned with eliminating a major source of organized crime revenue. *See* 116 Cong. Rec. H35294. The expansion of the jurisdictional reach of federal enforcement efforts was deemed the most effective solution to the growing problems of syndicated crime and bribery of state and local officials. *See, e.g.*, 116 Cong. Rec. S591.

With § 1955, Congress acknowledged that due to corruption of state officials and limited enforcement resources, states were unable to adequately control syndicated gambling activities. *See* H.R. Rep. No. 1549, 1970 U.S. Code Cong. & Admin. News at 4028-30, 4064; 116 Cong. Rec. S604.

The obvious is stated to note that the state gambling laws assimilated into federal law by § 1955 are state *criminal* laws, *only*. That is—§ 1955 is a federal criminal statute; it carries penalties of a $20,000 fine and/or five-year prison term for violations. Through the OCCA, Congress took aim at organized criminal entities engaged in large-scale syndicated gambling activities. *See, e.g.*, H.R. Rep. No. 1549, 1970 U.S. Code Cong. & Admin. News at 4029. As a corollary, and in contrast to Appellants' position, Congress was not concerned with lending federal assistance to the enforcement of state civil laws regulating permissible gambling activities.[11]

That Congress intended to assimilate only state criminal gambling laws in § 1955 is underscored also by the wording of § 1955's OCCA companion provision, § 802(a), codified at 18 U.S.C. § 1151.[12] Section 1151 makes a federal crime a conspiracy "to obstruct the enforcement of the *criminal laws* of a State or political subdivision thereof, with the intent to facilitate an illegal gambling business." (Emphasis added.)

In sum, the OCCA cannot be construed as authorizing the State to regulate the Tribes' bingo games or otherwise

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[11] For example, Congress expressly exempted from § 1955 bingo games and lotteries conducted by charitable organizations. 18 U.S.C. § 1955(e). *See Hearings* at 170. Appellant State of California permits such organizations to conduct bingo games pursuant to state regulations. *See* Cal. Const. art. IV, § 19(c).

[12] The legislative history of the OCCA describes §§ 1955 and 1511 as "parallel." *See* H.R. Rep. No. 1549, 1970 U.S. Code Cong. & Admin. News at 4029-30.

divest the Tribes of their immunity from the state civil regulatory laws on their reservations. Thus, for this reason as well, the conclusion must follow the Tribes may conduct their bingo games free of the State's bingo regulation because Congress has not derogated the Tribes' historic tradition of immunity from such laws.

C. The Relevant Federal Laws To Be Read Against the Backdrop of Tribal Sovereignty in this Case Make Clear That California Has Exceeded Its Lawful Authority in Attempting to Regulate the Indian Tribes' Bingo Games.

The analysis of the relevant federal laws which further define the limits of State power must begin with the laws and executive orders that set aside the Morongo and Cabazon reservations. Those laws and orders are identical in relevant respects to the treaty provisions setting aside the reservation in *McClanahan*, which the Court held pre-empted the extension of state law to Navajo Indians on their reservation. In *McClanahan*, the Navajo treaty provided, *inter alia*, that the prescribed reservation would be set aside "for the use and occupation of the Navajo tribe of Indians." 411 U.S. at 174. Employing the canon of construction in federal Indian law that doubtful treaty expressions are to be resolved in favor of the Indians and recognizing the tradition of Indian independence from state control, the Court in *McClanahan* concluded that the reservation of lands for the use and occupancy of the Navajo Tribe was meant to establish those lands as within the exclusive sovereignty of the Navajo Tribe and the federal government. 411 U.S. at 174-175.

Similarly, here an established tradition of Indian immunity from state control has been shown. *See* Part B above. Moreover, the federal law setting aside the Morongo and Cabazon reservations, as in *McClanahan*, evinces Congressional intent to set aside lands for Indian

use free of state control, especially when read in light of the canon of statutory construction in federal Indian law requiring that statutes passed for the benefit of Indians be construed liberally in their favor. *Montana* v. *Blackfeet Tribe of Indians*, 105 S. Ct. at 2403-2404.

Specifically, the Cabazon original reservation was set apart for the "permanent use and occupancy" of the Cabazon Indians. *See* Executive Order of May 15, 1876. In 1891, Congress authorized the permanent setting aside of reservations, *inter alia*, for the Cabazon and Morongo Indians, employing executing language which even more clearly than the treaty language in *McClanahan* establishes those reservations as free of state control over the Indians there. More specifically, in Section 3 of "An act for the relief of the Mission Indians in the State of California," 26 Stat. 712 (1891), Congress declared reservations for, *inter alia*, the Cabazon and Morongo Bands of Mission Indians ". . . for the *sole* use and benefit of the band or village." (Emphasis added.)

For two reasons, Amici assert the foregoing enactments evince clear Congressional intent to set apart the reservations in this case free of State control over the Indians there. First, in 1891, when the reservations at issue here were set aside, State and non-Indian/tribal relations at best were hostile. Those hostilities are described fully in, *inter alia*, a "Report of Special Agent John G. Ames in Regard to the Condition of the Mission Indians of California, With Recommendations, Wash. D.C., October 28, 1873" in "Papers Accompanying the Report of the Commissioner of Indian Affairs, 1873", wherein Agent Ames noted:

> The Indians . . . accuse the whites of driving them from their lands and wresting them from their homes, in violation of every principle of justice, protesting their unwillingness to submit longer to such treatment, and their purpose to take matters into their own hands unless the whites desist from

> their encroachments or the Government protects them in their rights. *Id.* at 34.

See also, Report of the Secretary of the Interior, November 1, 1883; Report of the Commissioner of Indian Affairs, 1875; *Kagama*, 118 U.S. at 381-82. Thus, the historical record indicates that the Tribes insisted and Congress intended the Reservations to be set aside exclusive of State jurisdiction over the Indians occupying them.

Second, in 1891, a tradition of tribal sovereign immunity from state jurisdiction was acknowledged widely. *See Kagama*, 118 U.S. at 382-384. Accordingly, Congress presumably intended to preserve that tradition in setting aside the Cabazon and Morongo Reservations in the absence of unequivocally-stated contrary intent. That contrary intent is not evidenced in the relevant history. H. R. Rep. 3251, 51st Cong., 2d Sess. (1891). Thus, the conclusion must follow that the Cabazon and Morongo Reservations were set aside for Indians free of State jurisdiction.

Should any doubt remain as to whether the reservations in this case were established free of State control over the Indians there, that doubt should be removed by the mere existence of P.L. 280, completely apart from whether P.L. 280 is a grant of the jurisdiction asserted by the State here. In other words, as this Court noted in *McClanahan* at 411 U.S. at 178, Congress surely would not have established so elaborate a means for state acquisition of jurisdiction over certain on-reservation conduct of Indians if, as asserted by Appellants here, the State could acquire jurisdiction over Indians instead simply by enacting legislation unilaterally.

In sum, the relevant laws in this case, against a backdrop of Indian immunity from state control, make clear that California is prohibited explicitly under federal laws from regulating the Indian tribes' conduct of bingo games on their reservations.

D. Congress Plainly Has Not Consented To California's Regulation of Indian Tribes' Conduct of Bingo Games on Their Reservations.

As discussed earlier in Subsection B, and more fully in the brief of other Amici in this case, no federal law authorizes the state regulation of Indian or tribally-operated bingo games on Indian reservations in California. Moreover, under federal law Indian conduct of bingo games on California Indian reservations is not even a federal offense. Accordingly, since Congress has not plainly divested the Tribes of a relevant aspect of their immunity from state control or repealed the Mission Relief Act (which must be construed as prohibiting California from regulating the activities of the Indian Tribes on their reservations), state jurisdiction clearly does not lie in this case. *See, e.g., Rehner*, 463 U.S. at 719-720; *McClanahan*, 411 U.S. at 171; *Montana*, 105 S. Ct. at 2405.

II. FOR PURPOSES OF ARGUMENT, EVEN IF THE PARADE OF HORRIBLES DESCRIBED BY APPELLANTS WERE TO OCCUR IN THE ABSENCE OF STATE REGULATION, APPELLANTS' REMEDY PROPERLY IS LEGISLATIVE RATHER THAN JUDICIAL.

A. The Record Shows Neither A Vacuum In Law Enforcement Nor Evidence of Organized Crime in the Indian Tribes' Bingo Games.

As the Ninth Circuit in this case observed, no evidence whatsoever exists that organized crime has infiltrated the Indian bingo games at issue.[13] 783 F.2d at 904. More-

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[13] Moreover, the record in this case contains absolutely no evidence that organized crime has infiltrated Indian bingo games anywhere. *Cabazon*, 783 F.2d at 904. *See also*, "Prepared Statement of Victoria Toensing, Deputy Assistant U.S. Attorney General, Criminal Division before House of Representatives Committee on Interior and Insular Affairs, Concerning Various Acts to Regulate Gambling on Indian Reservations, November 14, 1985"; 131 Cong. Rec. S4124 (daily ed. April 4, 1985) (statement of Sen. DeConcini).

over, even if unlawful conduct were to occur at the Indian bingo games, both tribal and federal laws, and certain state laws incorporated under federal law, are available to ensure such conduct is thwarted. *See, e.g.*, Federal Enclaves Act, 18 U.S.C. § 1152 (1982) (extending the laws applicable in other federal reservations to Indian territory); *Williams* v. *United States*, 327 U.S. 711 (1946) (construing 18 U.S.C. § 1152); 25 U.S.C. § 81 (1982) (requiring the Secretary of the Interior to review and approve certain contracts with Indian tribes).

B. Even *Assuming Arguendo* Appellants Encounter the Parade of Horribles They Evidently Anticipate, Proper Respect for Tribal Sovereignty and Congress' Plenary Power Over Indian Tribes Requires that Appellants Seek a Legislative, Not a Judicial, Remedy.

Congress has been held to have plenary power over Indian tribes. *See generally Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831); *United States* v. *Kagama*, 118 U.S. 375 (1886). In the exercise of that power, Congress can act quickly and decisively to remedy problems involving Indians on their reservations. Indeed, in light of that broad Congressional authority over Indian affairs, this Court itself has observed that its role in adjusting relations directly implicating Indian tribes' sovereignty on their reservations correspondingly is restrained. *See Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 61 (1978).

Moreover, Congress, through hearings and committee deliberations, is best equipped to consider limitations on tribes' immunities in response to complaints by non-Indians. Tribes nationwide, with federal executive branch support, conduct bingo games which are important sources of governmental revenues in light of declining federal funds and the virtual absence of any tax base on their reservations. As this Court has observed, the ability of Indian tribes to finance their own governments is a keystone of general federal Indian policy. *See, e.g., Kerr-*

McGee Corp. v. *Navajo Tribe of Indians*, 105 S. Ct. 1900, 1904 (1985) (". . . the Navajos can gain independence from the Federal Government only by financing their own police force, schools and social programs. See President's Statement on Indian Policy, 19 Weekly Comp.Pres.Doc. 98, 99 (Jan. 24, 1983)"). These Tribes, therefore, are entitled to careful consideration as to whether they should be divested of their right to conduct bingo as a means to raise essential governmental revenues in the Indian territory free of state regulation which would limit those revenues drastically. Accordingly, Amici urge that if Appellants encounter the parade of horribles they evidently anticipate, they must take their complaints to Congress for careful consideration, rather than ask this Court to depart so radically from its established principle of restraint by emasculating tribal sovereignty at the outset. *See, e.g., Kerr-McGee Corp.*, 105 S. Ct. at 1904 (1985).[14]

CONCLUSION

The only question presented to this Court is whether Congress has repealed the Indian Tribes' immunity from California's civil/regulatory laws, including its bingo laws, which immunity Congress confirmed in the Act setting aside the Tribes' reservations. The State can show no such repeal. Accordingly, the State's attempt to regulate the Tribes' games in this case is federally-pre-empted. Appellants, therefore, must turn to Congress for authority, in the future, to regulate the Tribes' bingo games.

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[14] Indeed, Congress has pending before it two proposals for the regulation of gaming activities on Indian reservations. The House of Representatives on April 21, 1986, approved H.R. 1920. The Senate Select Committee on Indian Affairs on September 18, 1986, completed markup of a bill to regulate Indian gaming.

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